No. 9294

In the United States Circuit Court of Appeals

For the Ninth Circuit.

LUMBERMEN'S MUTUAL CASUALTY COMPANY, a corporation,

Appellant,

vs.

MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, a minor, and LORAINE JOHNSON,

Appellees.

REPLY BRIEF OF MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, A MINOR, AND LORAINE JOHNSON, APPELLEES.

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REPLY BRIEF OF MRS. LEOTIA E. McIVER, JEFF CLARK, GRACE VAUGHN, A MINOR, AND LORAINE JOHNSON, APPELLEES.

This action is one brought by the appellant, as plaintiff, to relieve itself of the responsibility of defending and paying any judgment in a suit instituted by appellee, Johnson, against appellees, McIver and Clark, and Vaughn. The duty of sustaining the burden of proof is admittedly the appellant's.

Appellant's first witness was Clark whose history was clear and convincing. He expressed in testimony that he was certain that at the time of the accident he was driving the automobile insured by appellant. Any violation of the motor vehicle laws would not alter or change the decision of the court that he was operating the car.

The physical facts, after a description of the car, indicate the possibility of the operation of the car by Clark. Nowhere does the testimony disclose the physical inability of Clark to operate the same, and the trial court was right and justified in making a finding as to the operating of said car by Clark. In reply, we herewith quote from the Memorandum Opinion of the District Judge, Ralph E. Jenney [R. 57-58]:

> "Effort was made by counsel for the insurance company to impeach the testimony of Mr. Clark by introducing in evidence two written statements, admittedly signed by Clark at the instigation of a representative of the insurance company—six and ten days, respectively, after the accident. Mr. Clark testified substantially as follows: These statements were written out by the insurance company's representative and he, Clark, signed them without reading them over carefully. He understood that they were simply informal reports of the accident and felt at the time that he should 'play ball' with the insurance company as he was in the real estate and insurance business himself. For these reasons he was not careful to correct the written statements when they were submitted to him. These written statements contained assertions of fact which were disproved at the trial. Some, at least, of these misstatements were so at variance with the proven facts and the probabilities as to indicate to the court that they were inspired by an over-zealous insurance company representative. In any event the written statement that Gracie was driving the car at the time of the accident was repudiated by Clark. The court feels that the testimony of Clark at the trial revealed the true facts and that the written statements were inaccurate, and in some respects untrue."

Certainly appellant does not wish to impress this court to the effect that it would countenance the giving of perjurious testimony by its assured, and this court can only consider and be bound by the testimony given at the time of the trial. Effort was made by the appellant to impeach the testimony of Jeff Clark. The District Judge disregarded the written statements given to the insurance adjuster shortly after the accident, and gave full faith and credit to the sworn testimony of Jeff Clark given at the time of the trial. The District Judge is the sole judge of the credibility of witnesses appearing before him. He is the sole judge of the facts presented before him; and where there may be contradictory testimony, the finding of the trial judge is binding upon the Appellate Court.

Findings Will Not Be Upset on Appeal.

"All reasonable inferences are to be indulged in support of the findings and the burden is upon appellant who claims error to show its existence."

Purham v. First Natl. Bank of LaVerne, 87 Cal. App. 224;

Miller v. First Savings Bank, 90 Cal. App. 387.

Vol. 2, 1938 Supplement, New Calif. Digest, McKinney's, page 143:

"In the absence of a showing to the contrary, it must be assumed that a judgment which has become final was supported by the findings."

Harris v. Hensley, 214 Cal. 420, 6 P. (2d) 253.

"Every intendment must be indulged to support a finding."

Estate of Putnam, 219 Cal. 608, 28 P. (2d) 27 (reviewed in 22 Cal. Law Review, 450).

"The mere fact that the trial court found against a special defense was not sufficient to justify the appellate court in interfering with the judgment on appeal on the judgment-roll alone, the presumption being in favor of the findings and judgment in the absence of the evidence."

Nunziato v. Prout, 104 Cal. App. 573, 286 P. 455, 287 P. 366.

Vol. 2, 1938 Supplement, New Calif. Digest, McKinney's, page 144:

"It is the appellate court's duty to indulge all reasonable inferences to support the findings and judgment."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 P. (2d) 337.

"In absence of a showing by the findings that the evidentiary facts were the only facts proved or that the court found the ultimate fact from the probative facts alone, mere circumstance that some of the probative facts do not support the ultimate fact will not permit the appellate court to disregard the ultimate fact if there is substantial evidence to support it."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 P. (2d) 337.

"Although certain probative facts did not appear to support the ultimate fact that there was no wilful misconduct, where there was no indication that there

were not other facts to support the ultimate fact, and there was other evidence to support the ultimate fact, the findings were conclusive on appeal."

Volat v. Tucker, 9 Cal. App. (2d) 295, 49 P. (2d) 337.

"In an action tried before the court, findings of fact are conclusive on the Appellate Court though it might have reached a different conclusion on the evidence."

National Surety Co. v. Globe Grain and Milling Co., 256 F. 601, 167 C. C. A. 631. (This is a decision of the United States Circuit Court of Appeals of California.)

II.

The appellant, under its heading of "Questions Involved" on page six of its brief, says that the trial court abused its discretion in not applying principles of law with respect to joint operation of automobiles in violation of law as to age. Appellant is raising this question for the first time on appeal. The question was not raised at the trial. The appellant's complaint in the District Court alleged that Grace Vaughn alone was operating the automobile at the time of the accident, and the burden of proving this was upon the appellant. The trial court found as true that Jeff Clark was operating the automobile at the time of the accident and that Gracie Vaughn was not operating the automobile at the time of the accident. Appellant did not introduce any evidence at the time of the trial to show any joint operation, and now for the first time appellant concedes that Clark was driving at the time of the accident, and now on appeal seeks relief from a judgment which is against the appellant.

Quoting again from Judge Jenney's Memorandum Opinion [R. 52-53]:

> "It is well established both on principle and authority that when the existence of the policy at the time of the loss has been admitted and compliance therewith has been alleged, the burden of proving affirmative matter constituting a special defense rests upon the insurance carrier. Aetna Ins. Co. v. Kennedy, 301 U. S. at 395; Hartford Fire Ins. Co. v. Morris (C. C. A. 6), 27 F. (2) 508; Murdie v. Maryland Casualty Co. (D. C. Nev.), 52 F. (2) 888, appeal dismissed, 57 F. (2) 1081; Kimball Ice Co. v. Hartford Fire Ins. Co. (C. C. A. 4), 18 F. (2) 563. The burden of proving the special defense in the case at bar accordingly rests on the Lumbermen's Mutual Casualty Company.
>
> "This conclusion is re-enforced by an examination of the pleadings. It is to be noted that the insurer's allegation consists, not of a statement that Jeff Clark *was not* operating the automobile, but of an affirmative assertion that Gracie Vaughn *was* driving it. The burden of proving that fact rests on the one asserting it.
>
> "The Vehicle Code of California provides as follows:
>
> " 'Driver' is a person who drives or is in actual physical control of a vehicle." Section 69.
>
> " 'Operator' is a person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway." Section 70.
>
> "The one question of fact before the court therefore is: Was Gracie Vaughn driving or in actual physical control of the motor vehicle at the time of the impact?"

III.

In reply to appellant's "Specification of Errors Assigned" on pages 7, 8, 9, and 10 of its brief, the findings of fact of Judge Jenney speak for themselves and are amply supported by the testimony introduced at the time of trial. [R. 53 to 57, incl.]

IV.

Appellees' Argument.

Quoting again from the Memorandum Opinion of Judge Jenney [R. 53 to 57, incl.]:

> "At the trial Jeff Clark testified to the following facts: There were three persons in the front seat of the automobile, with Gracie Vaughn on the left, behind the wheel. He was in the middle and Gracie's sister, Maxine, was on his right. He sat close to Gracie, with his back toward Maxine and was teaching Gracie to drive the car. The lesson had been carried on for about twenty minutes prior to the accident and the same seating arrangement had prevailed during the entire period. Prior to that time Clark himself had been at the wheel driving the party about town. About eighty feet from the intersection at which the accident occurred and while the car was going about twenty-five miles an hour, he said to the girl, 'Put your brakes on, Gracie'. The brakes, when applied, caught just for a moment and then released. Gracie hollered 'They won't hold'. He glanced at the floor-board and saw that Gracie's foot was on the brake pedal which was depressed to the floor-board. The car was proceeding westward down an incline toward the intersection and the speed of the car being gradually accelerated. At the street intersection several cars were stopped in compliance with the boulevard stop sign there located. Clark's

car was traveling nearer the center line of the street than the curb line. About fifteen or twenty feet behind the cars that were stopped at the boulevard, Clark realized he might bump into them. He grabbed the steering wheel, first with his left hand and then with his right, and swerved the car in a southerly direction so as to miss the automobiles in front of him. The southerly side of the street appeared to be clear from all direction. However, Loraine Johnson, who was crossing the street in a southerly direction in front of the stopped cars, and who had proceeded about two-thirds of the way across the street, was struck by the left front fender of the car.

"Just prior to the impact, and as soon as he saw the pedestrian, Clark removed his left hand from the wheel, reached over Gracie's lap under the steering post, and grabbed the emergency brake. The emergency brake on that car came out from under the cowling and was operated by pulling the lever backwards. The brake lever did not lock automatically unless it was pulled straight back toward the driver. If it was pulled to the right it would not lock automatically, although its brake pressure would be applied.

"Clark thereafter kept his left hand on the emergency brake lever until the car was finally stopped. At the time of the impact with Loraine Johnson the car was still traveling about twenty-five miles an hour, having picked up speed because of the incline down which it was proceeding. Clark did not remember definitely whether or not Gracie took her hands off the wheel when he took hold of it; he does remember, however, that at the time he grabbed it she had her hands on the lower part of the wheel and does not remember that she continued that hold. In any event he had no interference from Gracie's

arms or body in operating the car. After Clark grabbed the wheel and until the car was finally stopped, Gracie did nothing and was terribly excited. After the impact Clark continued to hold onto the emergency brake with his left hand and, with his right hand, steered the car across the intersection and onto the right-hand side of the street, stopping in the middle of the next block near the curb line. As he thought the foot brake would not work, he stopped the car with the emergency brake.

"Gracie Vaughn testified to the following facts: She knew nothing about driving an automobile at the time she began to take the lesson, twenty minutes prior to the accident. During that twenty minutes, she had been driving under Mr. Clark's immediate supervision, making several stops and starts, the car operating perfectly. The seating arrangement and the circumstances leading up to the accident were substantially as indicated in the testimony of Mr. Clark. Approximately forty feet behind the cars which were stopped at the intersection Mr. Clark reached over her lap and grabbed the wheel and the emergency brake. He held onto them both until the car was stopped at the right hand curb line in the next block and they alighted. After Mr. Clark took hold of the steering wheel, she did not attempt to turn the car in any direction or to operate it. In answer to the question as to whether or not she had done anything else in operating the automobile after Clark seized the wheel and swerved the car, Gracie testified: 'I can't remember, it happened so quick I don't know; I don't think I did. I don't remember whether the motor was still going. I can't remember what part of the wheel Mr. Clark took hold of; and I can't remember whether I continued to hold onto the wheel or not. I can't remember what I did.'

"In regard to the foot-brake and clutch pedal, Gracie testified at first that she remembered pressing on both pedals before discovering that the brake would not work, and that at the time of the accident they were both depressed. *Upon cross-examination she admitted frankly that she really did not know whether her feet were on the brake and clutch pedals at the time of the impact. She was much excited and could not remember what she did.* (Italics ours.)

"The court is inclined to believe that both Gracie and Mr. Clark tried to tell on the stand a straightforward story as to what occurred. It is inclined to resolve any discrepancies between the two accounts, in favor of Mr. Clark's testimony as against the testimony of a fourteen year old child. The minor, evidently, very much flustered, disclosed no certain knowledge of what happened after Mr. Clark grabbed control. She apparently—and perhaps quite naturally—lost her head. In such circumstances the court feels that the testimony of an experienced man, of mature years, who evidently was cool and collected, and who was thinking and acting quickly and efficiently, is more reliable and credible.

"The court therefore finds as a fact that Gracie Vaughn was not driving or in actual physical control of the motor vehicle at the time of the accident; that she was activating none of the operating devices of the automobile; that her role was a passive one, and she in no way interferred with the operating activities of Mr. Clark. While not actually in the driver's seat, Clark was in full control of such operating devices as he deemed expedient to use in the emergency. The court further finds that Mr. Clark was actually in physical control of the motor vehicle at the time of the impact."

The Judge's comment on the attempted impeachment of Clark's testimony has been previously covered in this brief.

Appellant is relying entirely on the case of *State Farm Mutual Auto Insurance Company v. Coughran,* 303 U. S. 484, 82 Law. Ed. 970. The other cases cited by appellant are of some academic value, but have no application to the issue before this court, and appellees will not burden Your Honors with a comment on the same.

In the case of *State Farm Mutual, etc. v. Coughran, supra,* there was a direct finding by the trial court of joint operation. There was evidence before the trial court that the minor had been entirely operating the car before there was any evidence that an accident was to occur or might occur, and further testimony that the minor knew how to operate an automobile. The wife of the assured, who was sitting next to the minor in the front seat of the car, was not teaching the minor to drive, and it was only when an accident was imminent that the wife of the assured grabbed the wheel, and the court held that her act was the proximate cause of the accident. There was no evidence that Helen B. Anthony did anything else but grab the wheel; she made no effort to stop the car. There was further testimony that the minor continued to operate the car even after Helen B. Anthony, the wife of the assured, grabbed the wheel and the minor continued said operation up to the point of impact.

Quoting again from Judge Jenney's Memorandum Opinion [R. 58-59]:

> "Counsel for the insurer insists that this case is controlled by the decision in State Farm Mutual Auto Ins. Co. v. Coughran, 303 U. S. 485, because Gracie Vaughn and Jeff Clark were jointly operating the

vehicle. An examination of that opinion discloses an express finding of joint operation. The evidence there showed that a minor in the driver's seat was actually employing all of the operating devices except the steering wheel which had been seized by the insured's wife. No such finding can be made on the evidence in this case. There is no convincing evidence that Gracie Vaughn activated any of the operating devices of the vehicle. *The fact that there may have been available to Clark certain devices which he did not use, or that he did not do certain things which he might have done, is not material here. His failure to blow the horn to warn pedestrians, or to use the clutch or foot-brake—assuming that the latter was functioning—may or may not have amounted to negligence, but such failure of Clark cannot prove that Gracie Vaughn was the operator of the car. Her mere presence in the front seat behind the driving wheel is not determinative. The holding of a small child in the lap of a driver—alone, could not be held to be proof of joint operation; and Gracie's presence in the driver's seat was no more efficacious for driving purposes than the child in the lap."* (Italics ours.)

In the present case under consideration, the testimony of Jeff Clark [R. 79, 80, 81, 86, 87, 88, 99 to 119, incl.] is that when the car was about eighty feet from the intersection at which the accident occurred, Clark said to Grace Vaughn, "Put your brakes on, Gracie." The brakes would not hold and Gracie hollered, "They won't hold."

At the street intersection where Loraine Johnson was hit, she being in the pedestrian zone at the time she was hit, there were several cars that had come to a complete stop in compliance with the boulevard stop sign there located and were permitting Loraine Johnson to proceed

across the pedestrian zone. Clark's car was traveling nearer the center line of the street than the curb line. About fifteen or twenty feet behind the cars that were stopped at the boulevard, Clark realized he might bump into them. He grabbed the steering wheel, swerved to the left for the purpose of avoiding hitting the parked cars. He did not see Loraine Johnson because she was passing in front of the parked cars. He went around the parked cars, hit Loraine Johnson, proceeded across the intersection, drove over to the right side of the road, stopped his car in the middle of the next block. He tried to apply the emergency brake. As soon as Clark saw Loraine Johnson he reached for the emergency brake and grabbed the emergency brake. However, he was too close to Loraine Johnson to stop the car before the impact. He kept his left hand on the emergency brake until the car was finally stopped about a half a block away. After Clark grabbed the wheel about twenty feet in back of the parked cars, and the parked cars were approximately twelve to fourteen feet long which would place Loraine Johnson about thirty-two to thirty-four feet away from the front of Clark's car at the time he took hold of the steering wheel, Grace Vaughn did nothing in connection with the operation of the car; and upon cross-examination [R. 131 to 134, incl.], she admitted frankly that she really did not know whether her feet were on the brake and clutch pedals at the time of the impact. She did not know whether her hands were on the steering wheel. She was much excited and could not remember what she did. She testified there was no interference from her arms or body to prevent Clark from taking the wheel and grabbing the emergency brake. After Clark grabbed the wheel and until the car was finally stopped, she did nothing and was terribly excited. The testimony of Clark and Grace Vaughn was corroborated

and substantiated by the witness, Maxine Vaughn, who testified [R. 137 to 140, incl.], that when Grace said, "The brakes do not hold," that then Mr. Clark took the wheel. That there were cars stopped at the intersection and there was a boulevard stop there, and when Clark took the wheel his car was twenty feet in back of the parked cars and that he swerved around the parked cars, struck Mrs. Johnson, continued on steering the car to the right side of the road and stopped one-half block away from the intersection where the accident occurred. She further testified that Mr. Clark had ahold of the steering wheel from the time he started to swerve out and go on the north side of the road until the car came to a stop again on the south side of the road and that she was sitting in the front seat to the right of Jeff Clark who was sitting closest to Grace Vaughn.

Certainly the facts of this present case are in no respect similar to the facts in the *State Farm* case, *supra,* and with the evidence herein cited and contained in the reporter's transcript, there is ample testimony to support the finding of fact of the trial court, to-wit, Finding No. 10 [R. 67]:

> "That the automobile at the time of the accident was operated by said Jeff Clark and was not operated by any person in violation of the Vehicle Code of the State of California. That said automobile at the time of said accident was not operated by said Grace Vaughn."

The burden was on the insurance company to prove, by a preponderance of the evidence, that the automobile in question was operated by Grace Vaughn *at the time of the accident.* The time of the accident is when Mrs. Johnson was hit.

Operating an automobile under the laws of the state of California:

Section 70, Vehicle Code:

> " 'Operator' is a person other than a chauffeur, who drives *or* is in actual physical control of a motor vehicle upon a highway." (Italics ours.)

A driver under the laws of the state of California:

Section 69, Vehicle Code:

> " 'Driver' is a person who drives *or* is in actual physical control of a vehicle." (Italics ours.)

The evidence is conclusive that Jeff Clark alone was the driver and also was in actual physical control of the vehicle at the time of the accident. Under the law above cited, if he were only in actual physical control of the vehicle at the time of the accident, he would still be the driver or the operator because the definitions are in the disjunctive.

What is meant by driving or operating an automobile and what are the acts necessary to drive or operate an automobile?

1. The car must be given gasoline.
2. The car must be in gear or may be in neutral.
3. The operator must steer the vehicle.
4. The operator must apply the brakes to the vehicle.

A combination of these things results in the operation and driving of an automobile. What was Jeff Clark doing of these things at the time of the accident? Answer: He was steering the automobile for approximately thirty-two feet before the impact, and was endeavoring and successfully endeavored to avoid hitting parked cars; he knew

what he was doing and succeeded in doing it. He tried to stop the car with the emergency brake when he saw that Mrs. Johnson was in front of him in the pedestrian zone. The car was already moving so there was nothing further for him to do to make the car move and there was no testimony that Grace Vaughn was applying or giving the motor any gasoline at the time and after Jeff Clark took hold of the steering wheel, and her testimony is that she does not recall doing anything in connection with the operation of the car after Jeff Clark took hold of the steering wheel and she corroborated his testimony about reaching across her for the emergency brake before the impact. Certainly no one can say, in view of these facts, that Grace Vaughn at the time of the accident was doing anything towards the operation or driving of the vehicle in question.

Appellees' Affirmative Argument in Support of the Decision.

In the case of *State Farm, supra,* the Supreme Court said that in support of the respondent's position, said respondent relied heavily upon the case of *O'Connell v. New Jersey Fidelity and Plate Glass Ins. Co.,* 201 App. Div. 117, 193 N. Y. Sup. 911, 23 A. L. R. 1473, and *Williams v. Nelson, infra.* The Supreme Court said:

> "These causes, we think, are not in point. They were decided upon facts and circumstances materially different from those here disclosed."

In the *O'Connell v. New Jersey, etc.,* case, *supra:*

> It was held that a violation of the provision of the highway law, forbidding minors below a certain age to operate an automobile, would constitute no defense to an action on an automobile liability policy

issued to the owner of the car, and a recovery was held justified where there was evidence that the insured had been teaching his fourteen-year-old granddaughter to operate his automobile; that, as she approached an opening which workmen had made in a bridge, she turned the car to the left to avoid the opening; that as she did so, and when the car was 20 feet from the opening the insured grabbed the wheel, turned to the right, and applied the emergency brake; that the car did not stop, but struck plaintiff's intestate. The court stated that it appeared beyond cavil that 20 feet before any accident occurred the owner of the car was operating it, and that the girl did not exercise any control over it for that distance, and that accordingly the insurer was not relieved from liability by reason of an exception in the policy that it did not cover loss on account of injuries caused by an automobile driven by, or in charge of, any person in violation of law as to age, or, in any event, under the age of sixteen years.

The decision in the *O'Connell* case is sound and the facts are almost identical with the facts in the instant case.

In the case of *Williams v. Nelson* (1917), 228 Mass. 191, 117 N. E. 189, Ann. Cas. 1918D, 538, 6 A. L. R., p. 379:

> Where the policy provided that it did not cover loss from liability for, or any suit based on injuries caused by, any automobile while driven or manipulated by any person under the age fixed by law, or under the age of sixteen years in any event, a finding was held supported by the evidence that prior to an accident a son of the insured under sixteen years had been driving the insured's automobile, which

caused an injury, but that shortly before the machine struck the person injured the insured suddenly leaned over and took the wheel from his son, and that, although he was not in a position to readily prevent the accident by manipulating the pedals, or levers for stopping the machine, yet he was driving, and that his was the dominating mind in control of the car, and it was therefore held that a recovery might be had under the policy.

The *Williams v. Nelson* case is sound law, and the facts are almost identical with the facts in the present case under consideration.

Conclusion.

In conclusion, we respectfully urge that the judgment of the District Court of the United States be affirmed.

Respectfully submitted,

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